90-1857

NO.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

CITY OF YONKERS,
Petitioner,

vs.

UNITED STATES; YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

YONKERS BRANCH NAACP'S OPPOSITION TO CITY OF YONKERS' PETITION FOR WRIT OF CERTIORARI

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JUNE 25, 1991

QUESTIONS PRESENTED

1. When a city's obligation to provide sites for public housing is embodied in a consent decree, and the decree also requires the city to waive any further appellate review of orders that relate to the obligation to provide sites, does the waiver validly operate to prohibit appellate review of a subsequent order involving a modification or expansion of the original decree obligation?

2. Does a district court abuse its discretion by requiring a city to transfer fee simple title to five public housing sites to a non-party developer that will construct public housing on the sites when the district court refuses the transfer subject to a protective right of reverter to the city in the event the sites are no longer used for public housing?

3. Does a district court abuse its equitable discretion when it modifies and expands a city's obligations as set forth in the consent decree without any notice or demonstration of a factual need for the modification in an evidentiary hearing?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
OPINIONS BELOW	9
REASONS FOR DENYING FOR CITY'S PETITION FOR REVIEW	11
A. THE COURT OF APPEALS' INTERPRETATION OF THE CONSENT DECREE WAS PROPER	11
B. THE CITY HAD NO RIGHT TO THE MODIFICATIONS IT SOUGHT	16
1. YONKERS HAS NO RIGHT TO A REVERTER CLAUSE	17
2. YONKERS NEVER SOUGHT AN EVIDENTIARY HEARING ON ANY ISSUE BELOW	20
CONCLUSION	23

TABLE OF AUTHORITIES

CASE	PAGE
Sealy Mattress Co. of Michigan, Inc. v. Sealy, Inc., 789 F. 2d 582 (7th Cir. 1986)	15, n.5
United States v. City of Yonkers, 624 F. Supp. 1275 (S.D.N.Y. 1985) aff'd in all respects, 837 F. 2nd 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988)	1
United States v. International Brotherhood of Teamsters, 905 F. 2d 610 (2d Cir. 1990)	14, n.5
United States vs. International Brotherhood of Teamsters, 931 F. 2d 177 (2d Cir. 1991)	12, n.4
United States v. Yonkers Board of Education, 856 F. 2d 444 (2d Cir. 1988) cert. denied, 498 U.S. 1077 (1989)	1
Statutes	
F.R.Civ.P. 70	3
All Writs Act (28 U.S.C. Section 1651)	18

STATEMENT OF THE CASE

1. This dispute arises during implementation of a court-ordered remedy in United States v. City of Yonkers, 624 F. Supp. 1275 (S.D.N.Y. 1985),aff'd in all respects, 837 F. 2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988). By a Consent Decree signed in January 1988, the City of Yonkers agreed, inter alia, to make available seven specific sites for 200 units of public housing. (A-22). Thereafter, the City first sought to modify and then vacate the Consent Decree. The district court denied these motions. See, United States v. Yonkers Board of Education, 856 F. 2d 444 at 449 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989). Yonkers did not appeal either of these decisions.

2. In the same Consent Decree, Yonkers agreed "that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled United States of America, et al v. Yonkers Board of Education,

624 F. Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree." (emphasis added). (A-25).

3. Between January 1988 and March 1990, the tedious process of drafting and publicizing Requests for Proposals; reviewing proposals and selecting a developer for the seven sites; gaining HUD approval for the sites, ensued.

4. In the spring of 1990, counsel for the United States informed the court that the chosen developer, Deluxe Development of New York, Inc. and HUD were negotiating the terms of a contract establishing the terms of the turnkey development and that the City of Yonkers would soon be required to pass title to five of the seven sites, as the Consent Decree contemplated, to the developer. [1]

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[1]. The 200 units of public housing are to be developed in two stages, the first including 142 units and the second 58 units. DeLuxe was the successful developer for the first stage. The housing is being built using the common "turnkey" method, by which the municipality conveys title to the sites to the developer who obtains construction financing to build the units. At their completion, the developer sells the units and conveys title to the Municipal Housing Authority which buys them with monies provided by HUD. (A-56).

5. Counsel for Yonkers immediately represented to the district court that, despite the clear language of the January 1988 Consent Decree making Yonkers responsible for providing the seven sites (A-22-23), Yonkers would not transfer title to the parcels. The City's representatives continued to take the same position during several conference calls through July 1990. During these calls, counsel for Yonkers consented to entry of an order specifically requiring transfer of title and did not suggest that such an order was beyond the scope of the Consent Decree.

6. In this light, in early July 1990, the United States submitted a so-called "title-order", by which Judge Sand required Yonkers to transfer title to the subject properties immediately before the contract signing between HUD and Deluxe. In the alternative, based upon the City Counsel's express refusal to voluntarily convey title, the district court invoked F.R.Civ.P. 70 to accomplish the transfer of title.

7. In April, 1990, a title company, employed by Yonkers

during the 1988-89 property condemnation process, reported to the City the apparent continued existence of certain clouds on title to two of the housing sites - at Whitman, a covenant prohibited construction of multi-unit edifices; on Helena, a third party allegedly had an easement over part of the parcel.

8. Despite this advice, Yonkers took no action to clear these apparent title defects.

9. The other parties learned about these defects in July 1990. The United States and the Yonkers Branch, NAACP, et al., interpreted the Consent Decree as requiring Yonkers to obtain clear title for conveyance to the developer of public housing. After several conference calls with the district court on this subject, Judge Sand entered orders of July 31 and August 2, 1990 requiring defendant Yonkers to clear title to the properties. Contrary to the City's position here, these orders imposed no new obligations on Yonkers, though they enumerated the specific steps required of Yonkers to obtain clear title for all sites.

10. In August and September, 1990, Yonkers sought estimates of the cost of clearing title from its title company which reported that it would take more than a year and a quarter of a million dollars just to identify those benefitting from the Whitman covenant and might take $35,000,000.00 to extinguish all claims arising from the Whitman covenant.

11. In November 1990, it became clear that the alleged Whitman covenant had not been included in the deed conveyed to the City and the Yonkers Board of Education when the City purchased the Whitman site in the 1950's. In this light, counsel for the NAACP sought an amendment to the August 2, 1990 order which had required Yonkers to condemn this covenant. On November 29, 1990, apprised of the apparent extinguishment of this covenant, the district court altered the August 2, 1990 order and required Yonkers to defend title and to condemn any easement, encumbrance or covenant only after it was determined to cloud title.

12. In the meantime, the uncertainty concerning the state

of title had a predictable effect on DeLuxe and HUD. DeLuxe did not wish to take questionable title. HUD did not wish to commit to fund a deal where title questions existed. The district court learned of these concerns through counsel and on November 8, 1990, in a status conference devoted [in part] to public housing issues, it made clear that Yonkers would be responsible for indemnifying any other party for costs expended to defend title-related suits. Yonkers suggests that no party brought this matter to Judge Sand's attention or sought relief from the uncertainty concerning title before the November 8, 1990 hearing and that it had no prior notice of the indemnification matter. This is simply untrue. By letter dated November 2, 1990, counsel for the NAACP expressly advised the district court of the specific difficulty and requested specific action by the district court to resolve the title problems. (SA-1-4). In this light, the district court made its comments about indemnification on November 8, 1990. Upon the City's application for reconsideration of the "indemnification

order" on November 29, 1990, the district court reiterated the City's obligation and explained that this duty derived from the commitment the City undertook in the Consent Decree - to provide seven identified sites for the public housing.[2] On December 19, 1990, upon the Department of Justice's submission of a written order, with notice to all parties, the district court signed the one and only indemnification order.[3]

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[2] Yonkers complains that the district court held no "evidentiary hearing" before entry of the indemnification order and considered no other alternatives. These claims are frivolous. Yonkers never requested an evidentiary hearing and presented no issue requiring such a hearing. Moreover, Yonkers presented no alternative to the indemnification order which had as its unfortunate predicate the contumacious conduct of the City which had refused to properly condemn the parcels identified by the January 1988 Consent Decree for public housing.

[3] The district court did not enter this order "sua sponte" as the City dishonestly represents. Rather, by letter dated December 14, 1990, the Department of Justice requested a written court order memorializing the district court's comments and directives as given on November 8 and 29, 1990. The Department forwarded a Proposed Order to all parties; the City objected to aspects of this Order on December 19, 1990, the date it was signed.

This Order belies the City's false characterization of it: Yonkers was not held as the indemnifier for any and all aspects of the contractual relationship between DeLuxe and HUD: rather, the Order relates solely to title defects on the first five housing sites. (A-51).

13. In January 1991, title was transferred to DeLuxe which broke ground on the five sites in March 1991. Currently, site preparation work is continuing. DeLuxe has represented that it expects to have the 142 module townhouse units completed and ready for tenant occupancy in November 1991. No state court action has been initiated by any party claiming to be the beneficiary of any alleged covenant restricting the use of the Whitman site, one of those now being prepared for public housing. The City has not been required to expend any resources quieting title at any of the five sites nor has it been required to indemnify any third party for costs related to any title challenges.

OPINIONS BELOW

The Court of Appeals dismissed the City's appeals of the title and indemnification orders on the basis that Section 10 of the Consent Decree barred precisely such appeals. (A-53-59). In the alternative, the Court of Appeals found the City's substantive arguments to be "without merit". (A-57).

The Court of Appeals decision does not divest the district court of authority to modify the public housing related obligations undertaken by Yonkers in the Consent Decree. It does properly read the Consent Decree itself as barring appellate review of denials of such motions for modification, giving meaning to the clear language of Section 10 of the Decree, "or of any subsequently entered decree". (A-57).

However, the Court of Appeals did not limit its review of the challenged title order to this first and dispositive ground. It also found that "none of the challenged provisions constitute an abuse of the district court's discretion.". (A-57).

The Court of Appeals agreed with the district court that

Yonkers has no current right to a reverter. First, the Consent Decree requires the use of the parcels in question for public housing alone. Second, all the contingencies on the list of horribles conjured up by Yonkers in moving for a reverter clause can be met by the district court's equitable authority. This made a reverter unnecessary to protect the city from the possibility that some other use will be made of any of the public housing sites and that it will, therefore, be required to provide additional sites for public housing.

Likewise, the Court of Appeals found no abuse of discretion in the district court's refusal to provide Yonkers with a pro rata release from its obligations based upon the provision of the first five housing sites. Agreeing with the district court that "[T]here are numerous ways in which the City may still impede the construction of the public housing," the Court of Appeals found the district court's denial of this request "prudent". (JA-59).

Finally, the Court of Appeals noted that the City's appeal

of its obligation to identify and clear all encumbrances prospectively was moot since the district court had vacated that aspect of the August 2, 1990 order on November 29, 1990. As to the City's contention that it should not have to provide clear title, defend that title and indemnify others who were required to expend monies in so proceeding, the Court of Appeals agreed with the district court's conclusion that these obligations all are subsumed in the pledge the City made in the January 28, 1988 Consent Decree - to provide "acceptable" sites. (JA-59).

REASONS FOR DENYING THE CITY'S PETITION FOR REVIEW:

A. THE COURT OF APPEALS' INTERPRETATION OF THE CONSENT DECREE WAS PROPER.

1. The Court of Appeals properly construed the Consent Decree as prohibiting appeals of orders implementing Yonkers' basis obligation - providing sites for 200 units of public housing. Clearly, this obligation subsumed that of providing clear and marketable title to the sites in question,

defending that title against challenges and indemnifying third parties should they incur costs defending title obtained from the City. In light of the rather obvious nature of the City's obligation and the functional connection between it and the orders the City challenges, this Court need not review this issue which is not one of general importance.[4]

Moreover, Yonkers' strained interpretation of the Consent Decree language hardly advances its argument. The district court found that the obligation to provide sites includes the obligation to insure that title to such sites is clear and, in this instance, to indemnify third parties from any title challenges. The City suggests that it merely agreed not to appeal from its

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[4] In United States v. International Brotherhood of Teamsters, 931 F.2d 177, 182, n.1 (2d Cir. 1991), the Second Circuit showed its appreciation for the general rule of law applied in this instance -"the rule against appellate review of the substance of a consent order applies only when the order explicitly covers the question sought to be appealed or when the issue on appeal does not raise a substantial question of interpretation.".

obligation to provide sites. (Petition for Writ of Certiorari at 16). Even if this is correct, the issue is whether the obligation to provide sites includes those set out by the district court's orders of July 31, August 2, and December 19, 1990. As the obligation to provide sites is meaningless if this could plausibly mean "sites without clear title", Yonkers' interpretation of the Consent Decree is frivolous. The City's principal contention - that its basic obligation could be met by providing sites without clear title - is ludicrous, indeed meaningless.

Finally, the City's argument does not explain the language "any subsequently entered decree". Clearly, as the 200 unit obligation is set forth in the Consent Decree, a subsequent decree would not simply restate that aspect of the Consent Decree. Yet, the City in advance agreed not to appeal such a decree so long as it "relates to the City's obligation to provide sites". Clearly, this language contemplates a prohibition on appeals from orders which implement the Consent Decree, not merely restate it. The appealed from

orders are quite clearly of this sort.

In any event, as the Court of Appeals properly determined the merits of the City's arguments, this Court most certainly need not review the Second Circuit's interpretation of the "appeal bar" language.[5]

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[5] The City cites U.S. v. International Broth. of Teamsters, 905 F.2d 610 (2d Cir. 1990) as conflicting with the opinion below. This argument misstates the facts in Teamsters where the Consent Decree was silent on whether an aggrieved party could or could not appeal from decisions by the district court. As the Court of Appeals noted, "Nothing in the Consent Decree indicates that the parties intended to waive the right to invoke the jurisdiction of this court.". Id at 615. Here, to the contrary, the Consent Decree expressly barred further appellate review not only of the initial liability decision, but also of subsequently entered orders, like those the City seeks to review here, relating tot he underlying obligation to provide sites for the 200 units of public housing. Nor can the City find conflict between the challenged decision and those of any other Circuit. The Second Circuit did not interpret the Consent Decree liberally in affirming Judge Sand's title order. The City was clearly obliged to use eminent domain proceedings to obtain title so that it could then convey title to allow the construction of 200 units of public housing. The title orders required specific and timely performance of the undertaken obligation. This is not a pre-liability finding case where a Consent Decree does not cure an adjudicated constitutional violation as here. Cf., Sealy Mattress Co. of Michigan, Inc. v. Sealy, Inc., 789 F.2d 582 (7th Cir. 1986) and the district court's jurisdiction here does not depend on the existence of the consent decree.

2. Yonkers next argues that some federal policy assures a party signing a Consent Decree with an appeal bar that this provision will not be enforced. This argument is unsupported by any precedent of this Court and, indeed, insupportable. No public policy requires permitting a defendant to appeal orders implementing its clear obligations where, in the Stipulation itself, the defendant has promised not to take an appeal. Yonkers did precisely this in January 1988 at a time when its leaders perceived the availability of appeals simply as a means which would be advocated by others in the community to cast continuing doubt on its remedial obligations, making it more difficult for the municipality to act as it had to. Indeed, foreswearing the right to appeal was Yonkers' own idea and Section 10 appears in the Consent Decree at the municipality's instance. Now, dominated by politicians who wish to impede implementation of the remedy order on any and every ground, the City seeks leave from its

own prior agreement. This Court need not legitimate such a dastardly and destructive course of conduct by agreeing to hear this writ. Finally, Yonkers' suggestion that the lower federal courts here have short-changed federal appellate jurisdiction is nonsense. These courts have properly interpreted and given plain effect to the stated will of the parties, as reflected in Section 10 of their Consent Decree. It is not for these courts to re-write the Consent Decree at Yonkers' instance. Nor, contrary to the precedent Yonkers cites at 18-19, has the district court, sua sponte, created any bar to appellate review.

B. THE CITY HAD NO RIGHT TO THE MODIFICATION IT SOUGHT.

Apart from properly affirming the district court's orders as within the compass of the Consent Decree, the Court of Appeals upheld the district court's rejection of certain requests for modifications to the Decree requested by the defendant. While the City focuses excessively on the alleged divestment of appellate authority, in fact, the Second Circuit

squarely considered and rejected, on the merits, Yonkers' appellate arguments.

1. Yonkers Has No Right to a Reverter Clause.

Yonkers has provided no reason for granting its petition to review the district court's eminently prudent decisions.

In the Consent Decree, the City of Yonkers agreed to transfer title to seven parcels to a developer chosen by the Municipal Housing Authority. The City then condemned several of the privately owned parcels and retrieved from the School Board others, i.e., Whitman and School 4. The Consent Decree does not specify that upon transfer of the property from Yonkers to the turnkey developer, the City would receive any form of reverter interest. In seeking to modify the Consent Decree so as to create a reverter interest for itself, the City did not adduce any evidence demonstrating a change in circumstances or condition sufficient to justify such a change. Nor did the City provide any basis in fact or law for

such a reverter. The district court explained that it would enforce the Consent Decree requirement that each of the parcels is used for public housing. None of the other public housing sites in Yonkers, several of which were provided by the City to the Housing Authority, has a reverter on the City's behalf and the City presented no contrary evidence or information. In short, there was simply no basis, either in the existing Decree or in any change in circumstance, for such a modification of the Consent Decree.

Yonkers argues that the district court abused its discretion in not requiring the deed transferring title of the properties to include a reverter on its behalf. Petitioner suggests that, under state law, the turnkey developer may alienate its temporary title to a third party. However, under the All Writs Act and the Supremacy Clause, the district court could enjoin any such alienation and insure the use of the parcel for the dedicated purpose: public housing. The City suggests that the district court would somehow not have jurisdiction so to act, but fails

to show why state rules would be regarded as superior to the well-known federal interests implicated here.

Nor does the MHA have the right under federal and state law to use the parcels for any purpose other than the housing of public housing residents. Cf. City Petition at 21.

In short, this matter is unworthy of this court's review. First, the matter will be moot before this court's review occurs as, by then, the private developer will have sold the parcels and given title back to the MHA which, by law, cannot use the housing for any purpose other than public housing. Second, the district court is dedicated to insuring the use of the parcels for their intended remedial purpose. Third, requiring a reverter to Yonkers would have only impeded the developer from receiving the construction financing necessary to complete the development, Yonkers' true objective here. Finally, denial of the reverter has caused no injury to Yonkers. It has not been requested to come forward with additional sites and no parcel has been alienated for a contrary use.

2. Yonkers Never Sought an Evidentiary Hearing on Any Issue Below.

As noted previously, the district court interpreted the "title" and "indemnification" orders as elaborations of the City's basic obligation - to provide clear title to the seven public housing sites, not as new orders imposing new remedial obligations. Moreover, the predicate for both orders was crystal clear on the record: according to its own title company, Yonkers had failed to properly clear title at two of the sites. The title order sought specifically to direct Yonkers' attention to this requirement, as it required the City to transfer clear title to DeLuxe. The indemnification order became necessary when Yonkers did not timely extinguish the title clouds, thus creating an intended obstacle to the conveyance of title to the developer. Only through this order could the district court assure the developer that taking title would not simultaneously transfer exposure for the City's incomplete condemnation effort.

The City complains that the district court failed to provide it due process before expanding its remedial obligations. Yet, any grammar school reading of the Consent Decree the City signed would lead to the inarguable conclusion that the City agreed initially to provide clear title and that the district court's orders did not expand on these obligations.

Moreover, the City never sought an evidentiary hearing on any issue below. Based on the title report of April, 1990, which was made part of the record below in July 1990 and argument it received during conference calls between March and July 1990, the district court had ample basis to enter the title orders of July 31 and August 2, 1990. This basis consisted in the following: Yonkers' January 1988 agreement to convey title; Yonkers' 1990 refusal to convey title; the need for the conveyance of title to allow the housing to be built; the clouds on title identified in April 1990; the City's failure by July 1990 to clear title to Whitman and Helena and

the need to clear title before the closing could occur. No other facts were relevant to the title orders and none of these facts were or could have been contested as of July 1990.

Likewise, the indemnification order was triggered by the need, discussed in open court on November 8, 1990, and set out in the NAACP's letter to the district court of November 2, 1990, to give DeLuxe and HUD assurance that the City would defend title and hold harmless subsequent title takers against the City's failure to properly condemn title. On November 8, 1990, counsel for the City did not request an evidentiary hearing on any issue. Nor, in moving for re-consideration of the November 8, 1990 "oral order" did the City make this request. Nor did it at any time prior to the entry of the final indemnification order of December 19, 1990.

Finally, the district court entered no orders sua sponte. Each order here challenged was entered upon the motion of one or another party and only after the City had prior notice of such intent and the opportunity to be fully

heard. The July 31, 1990 order had been circulated to the City and its objections heard before entry. The December 19 order was handled in a like manner.

CONCLUSION

The petitioner has adduced no compelling or logical reason for this Court to review minor orders which have had no practical effect on Yonkers and likely will have none. Petitioner signed a Consent Decree which it has disrespected at every turn. It now seeks this Court's sanction for its conduct. That sanction should not be now given. These matters should stand with the Court of Appeals' well-reasoned approach.

Respectfully submitted,

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Dated: June 25, 1991

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CERTIFICATE OF SERVICE

Michael H. Sussman, counsel for the Yonkers Branch, NAACP, hereby certifies that on June 25, 1991, I mailed three copies of Yonkers Branch NAACP's Opposition to the City of Yonkers' Petition for a Writ of Certiorari dated May 31, 1991 to:

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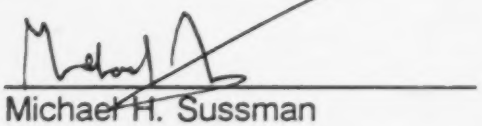

Michael H. Sussman

SUPPLEMENTAL APPENDIX

(SA)

Letter of November 2, 1990 from
Michael H. Sussman to Honorable
Leonard B. Sand 1-6

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November 2, 1990

Honorable Leonard B. Sand
United States District Court
Southern District of New York
40 Foley Square
New York, New York 10007

re: Yonkers

Dear Judge Sand:

I understand from counsel for the United States that the court has scheduled a hearing on November 7, 1990 to deal with housing issues outstanding in the Yonkers litigation. I have to be out of the country that day and, accordingly, cannot attend this proceeding. I apologize to the court for my absence and very much regret it as there are numerous important matters before the court. Adrianne Bonifacio, Esq., shall be present for the NAACP.

As your Honor is well aware, the NAACP is extremely concerned with the continuing delays in progress on the housing side of the case. The time has certainly passed for concrete action to move this situation forward and get housing built. I next outline the steps we believe ought to be taken immediately.

1. Public Housing

DeLuxe was selected to build at all seven public housing locations. Yet, to date, that company has not signed a contract with the MHA. Counsel for DeLuxe informs me that his client cannot proceed with work at the Whitman and Helena sites because of outstanding title clouds which preclude the issuance of title insurance. The Consent Decree of January 1988 obliged the City of Yonkers to clear title and transfer the parcels to the MHA and then to the turnkey developer. Yonkers has utterly failed to comply with this requirement with regard to Whitman and Helena. Now, having failed, Yonkers can watch the proceedings or lack of proceedings with glee. This is fundamentally unfair to the plaintiffs and a solution must be expeditiously implemented.

I propose that the court require Yonkers to satisfy the underlying concerns of the title company through the creation of an escrow account which shall be used to indemnify the title company for the costs of any litigation and any judgment stemming from the unsettled nature of title at these two parcels. The escrow must be in a sum sufficient to satisfy the title companies, not Yonkers, and probably must be flexible in quantum. I have not dealt directly with the title insurance company and cannot represent what escrow sum will suffice, but some figure should accommodate their concerns. I would propose that the court directly, after taking testimony from representatives of the companies, a sum sufficient to do the job.

DeLuxe's counsel also advises that School 4 cannot be demolished, and thus the property not developed for public housing, until the clearance of asbestos. Again, this is an issue which long since should have been resolved. The court should order the City to expend sums sufficient to make the building demolishable and set an enforceable schedule for accomplishing whatever must be done. This is, in fact, the only way, apparently, that the <u>site</u> can be used for public housing and the City's obligation is to make the site available.

The site cannot be deemed available if there is a building on it which cannot be demolished because of its condition. Again, the City has failed to meet its initial commitment.

In our judgment, the sequence of events from here should be as follows:

a. Court order requiring City to clear title at Whitman and Helena; creating an escrow satisfactory to title company and requiring City to cure asbestos problem at School 4. This order should also expressly require the City of Yonkers to remove any suit filed in state court stemming from covenants dealing with use of Whitman school site or Helena site. (We believe that any adjacent property owner has long since had notice with regard to plans for these sites and cannot now enforce their covenants due to the operation of laches.).

b. After creation of the escrow account, DeLuxe should expeditiously sign a contract with MHA and commence construction at Loring; Wrexham Whitman and Helena sites. DeLuxe will proceed with construction at School 4 as soon as the asbestos issue is resolved and the building is declared demolishable.

c. If DeLuxe is unwilling or unable to proceed on this basis, they either withdraw or are rejected as turnkey developer. DeLuxe's counsel represented to me earlier this week that they want to proceed in three stages: Clark/Loring and Wrexham first with payment upon conclusion; then School 4 (with payment) and then Whitman and Helena (after the City clears title, a process estimated at one year by Mr. Fox). Mr. Kleinerman represented that this would be a two year staging process. We find this totally unacceptable. The time-table must be truncated and driven by the readiness of the sites, not that of DeLuxe which committed itself to proceed years ago.

With regard to the 58 additional units, DeLuxe has told HUD that it does not want to proceed with their development at Lincoln and Gramercy. If this remains DeLuxe's position, then they should formally be dropped, without further ado, from this stage of the project and a new developer identified with dispatch. This is no time for game-playing.

2. Long Term Housing

Progress on this front has not been any swifter. Karen Hill has advised me that she has a number of projects in the works, but the Environmental Impact Statement required by Judge Haight has not yet been prepared and is apparently holding up the works. It is my understanding that the New York State Urban Development Corporation has the expertise to rather quickly complete such an impact statement. Their expertise should be requested so as to move this matter forward.

The NAACP also feels that since more than two years have passed without any site being approved, it is time to proceed to the contingency recognized in the Consent Decree. We propose the following which we feel can be accomplished without compliance with Judge Haight's order, as no federal monies are involved in its implementation:

1. Within thirty days, the City of Yonkers is to identify parcels which its Manager and Director of Development certify are sufficient for the construction of 1000 units of housing, 200 of which are to be affordable. In my conversations with him, Mr. DeLuca has identified considerable vacant property which can be used in this regard. Should the City default on the requirement to select sites, plaintiffs may submit sites for this purpose.

2. The parties and the FHIO will then have forty five days to review and comment on the propriety of the use of the properties identified by the City and make alternative

proposals. If the City defaults and proposes no sites, it shall not be permitted to comment on those proposed by the other parties.

3. The court will then resolve any disputes as to the propriety of the sites identified and authorize the use of the sites identified for affordable housing.

4. In the meantime, the FHIO shall develop RFPs which can be circulated to the development community pertaining to these sites. The RFPs will advertise the existence of the sites and invite proposals for their development, tenanting and management in a manner consistent with the long term housing ordinance. It will, obviously, apprise developers of the incentives to be made available by the City and the state assistance Ms. Hill has managed to negotiate. Developers will be responsible for complying with environmental review requirements after their selection.

5. A committee consisting of one representative from the NAACP; the Department of Justice; the City and FHIO will then evaluate proposals received and recommend those they feel will best achieve the objectives of the long term housing plans. The court will retain final authority to resolve any disagreements.

6. Any zoning changes shall then be requested from the City Council which shall review the proposed changes. If the changes are denied, any party will be able to seek review of that decision in this court. The same process will apply to the City Council's review of incentives deemed necessary to the project's feasibility.

We feel, as we have previously argued, that the Court must be more involved in implementation activity. The City has no will to implement and will do anything, subtle or overt, to prevent progress. We regard Mr. DeRosa's letters, in which he essentially represents that the City has done everything

required of it and dares anyone to challenge this assertion, as frivolous and uninformed. While the Supreme Court in Spallone overruled this court's use of equitable authority in one specific regard, i.e., fining the councilmen individually, it most ringingly endorsed this court's authority and obligation to get the remedy order implemented as against the City of Yonkers qua City of Yonkers. Consistent with this, more aggressive steps can be taken and are now compelled.

Very truly yours,

Michael H. Sussman

cc: All Counsel
Mr. Newman
Ms. Hill